MASBOH TRADING SDN BHD

v.

MEJARIS BUILDERS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[COMPANIES WINDING-UP NO: D2-28-110-1999]
28 FEBRUARY 2001

COMPANY LAW: *Winding-up - Petition - Notice of demand - Service - Service at business address and not at registered office - Whether non-compliance of s. 218(2)(a) Companies Act 1965 - Whether company "deemed" unable to pay debts if service other than as prescribed under s. 218(2)(a)*

In this case, the winding-up petition was based on the ground that the respondent company was unable to pay its debts by virtue of s. 218(2)(a) of the Companies Act 1965 ('the Act'). The statutory demand was served on a clerk of the company at the business address of the company. The issue was: (1) whether the company was "deemed" under s. 218(2)(a) to be unable to pay its debts as the statutory demand was not served at the company's registered office.

Held:

[1] In the Federal Court case of *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd*, 'deeming' under s. 218(2)(a) was held to be a presumption that was rebuttable. A rational approach to the requirement of service of the statutory demand at the registered office was to treat the requirement as no more than a prescribed method of service that was legally foolproof but default in the observance of which was not prejudicial if service was by some other means or at some other place.

[2] The company was therefore deemed to be unable to pay its debts and since there was no evidence to show that it was actually able to pay its debts or was commercially solvent, the petitioners were entitled to an order of winding-up.

[Petition allowed.]

Case(s) referred to:

Ann Joo Metal Sdn Bhd v. Pembenaan MY Chahaya Sdn Bhd [2000] 5 MLJ 708 ***(refd)***

Cymun Development Sdn Bhd lwn. Supermax Sdn Bhd [1996] 1 CLJ 545 ***(refd)***

Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd [2000] 4 CLJ 437 ***(refd)***

Pac Asian Services Pte Ltd v. European Asian Bank AG [1989] 3 MLJ 385 ***(refd)***

United Malayan Banking Corporation Bhd v. Richland Trade & Development Sdn Bhd [2000] 1 CLJ 57 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218(2)(a)

Companies (Winding-up) Rules 1972, r. 30(1)

For the petitioners - Ang Gim Yan; M/s SB Cheah & Assoc
For the respondents - SL Ong; M/s SL Ong & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Aziz Mohamad J:

This winding-up petition is based on the ground that the respondent company is unable to pay its debts, for proof of which the petitioners rely on the provisions of sub-s. (2)(a) of s. 218 of the Companies Act 1965, which provides as follows:

> (2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

The demand under para. (a) in this case ("the statutory demand") was served on a clerk of the company at the business address of the company, not at the registered office as required by the paragraph. It is not disputed that the company did actually receive the demand.

I have rejected the company's affidavit in opposition to the petition for non-compliance with the requirement as to time of r. 30(1) of the Companies (Winding-up) Rules 1972, but from a paragraph in that affidavit and certain things said by learned counsel for the company during submission about the

affidavit, it appeared to me that the company had desired to raise the issue of law as to the effect of failure to serve the demand by leaving it at the registered office of the company. So after I rejected the affidavit, I posed the question whether, in the absence of an affidavit in opposition, the company could nevertheless raise that issue, as it was an issue of law. After hearing and considering submissions on the question, I ruled that the company could raise the issue.

The question that calls for decision is whether, by the failure of the petitioners to serve the statutory demand "by leaving at the registered office", as required by the said para. (a), the company cannot be deemed under the said sub-s. (2)(a) to be unable to pay its debts, notwithstanding that the demand was in fact received by the company. In several cases, such as *Cymun Development Sdn Bhd lwn. Supermax Sdn Bhd* [1996] 1 CLJ 545 and *Ann Joo Metal Sdn Bhd v. Pembenaan MY Chahaya Sdn Bhd* [2000] 5 MLJ 708, the High Court nevertheless deemed the company to be unable to pay its debts.

I was at first inclined to think that the respondent company could not be deemed to be unable to pay its debts. I thought that the phrase "shall be deemed" in the subsection is not intended to create a presumption at all but actually means "shall be adjudged", so that there would be no question of a company showing, after the "deeming" had become operative, that it was able to pay its debts or was solvent. I was also impressed by the opinion of the Court of Appeal of Singapore in *Pac Asian Services Pte Ltd v. European Asian Bank AG* [1989] 3 MLJ 385, at p. 388 D-E left, that "if a petitioning creditor wishes to rely upon the 'deeming' provision in s. 254(2)(a) of the Act, strict compliance with the conditions set out therein is necessary" because "The presumption that the company is unable to pay its debts does not appear to be a rebuttable one", though it must be mentioned that in that case the statutory demand had been served at some address other than the registered office and it does not appear that the company nevertheless actually received the demand. Moreover, in *United Malayan Banking Corporation Bhd v. Richland Trade & Development Sdn Bhd* [2000] 1 CLJ 57, our Federal Court, at p. 63 c-d, agreed with our Court of Appeal that in order for the statutory demand to be effective it must comply strictly with the requirement, besides others, that it be served on the company by leaving it at the registered office, though it must be mentioned that that was not a case of failure to serve the statutory demand at the registered office.

Perceiving that the "deeming" is irrebuttable, I thought that the provisions of sub-s. (2)(a) must be strictly complied with before a company "shall be deemed to be unable to pay its debts". I thought that the requirements of para. (a) must be regarded as a legal ritual that must be strictly observed before the

"deeming" could arise. I viewed the requirement as to leaving the demand at the registered office as one that is as crucial to the deeming as the requirement that the sum demanded must exceed five hundred ringgit. I was certain that if the sum was five hundred ringgit the deeming would not arise, but it would if the sum were RM501, even though the difference is only one ringgit. So I thought that if, where the sum is concerned, a ringgit less would inhibit the deeming, then, where service is concerned, anything less than service at the registered office would not do notwithstanding that the company did receive the demand.

My basis for thinking that sub-s. (2)(a) must be complied with such strictness is now demolished with the citing by learned counsel for the petitioners of *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437, where the Federal Court, at p. 451 e-f, said this:

> It should however be borne in mind that s. 218(2)(a) does not create separate grounds for winding-up, but provides a mode of proof available in aid of an application seeking a winding-up on the ground specified in s. 218(1), *viz*, that the company is unable to pay its debts *(Ataxtin)*. A company will not be wound up, even if it fails to heed a valid notice, if it can establish by independent evidence that it is solvent (*Re Fabo*).

It means that the "deeming" is a presumption that is rebuttable.

To hold that failure to serve the statutory demand on a company by leaving it at the registered office will inhibit the deeming of inability to pay its debts even though it did receive the demand by service otherwise and yet failed to satisfy it would run contrary to reason and good sense and would be justified, if at all, only if the deeming is irrebuttable. Since according to the Federal Court the deeming is rebuttable, a rational approach to the requirement of service of the statutory demand at the registered office is called for, and the rational approach is to treat the requirement as no more than a prescribed method of service that is legally foolproof but default in the observance of which is not prejudicial to the deeming if the company did in fact receive the statutory demand by service by some other means or at some other place.

The company here is therefore deemed to be unable to pay its debts. Since there is no evidence to show that it is actually able to pay its debts or is commercially solvent, the petitioners are entitled to an order of winding-up. I make orders in terms of prayers (a), (b) and (c) in the petition.